

LUKAS, NACE, GUTIERREZ & SACHS

CHARTERED
1650 TYSONS BOULEVARD
SUITE 1500
MCLEAN, VA 22102
703-584-8678
FAX: 703-584-8696

RUSSELL D. LUKAS+
DAVID L. NACE+
THOMAS GUTIERREZ+
ELIZABETH R. SACHS+
GEORGE L. LYON, JR +
PAMELA L. GIST+
DAVID A. LAFURIA+
MARILYN SUCHECKI MENSE+
B. LYNN F. RATNAVALE+
TODD SLAMOWITZ+
STEVEN M. CHERNOFF+

CONSULTING ENGINEERS
ALI KUZEHKANANI
LEROY A. ADAM
LEILA REZANAVAZ
—
OF COUNSEL
JOHN J. MCAVOY+
J. K. HAGE III++
LEONARD S. KOLSKY+++

May 12, 2005

*ADMITTED ONLY IN DC
**ADMITTED ONLY IN NY
+++ADMITTED ONLY IN MA

<http://www.fcclaw.com>

WRITER'S DIRECT DIAL

(703) 584-8663
lsachs@fcclaw.com

Cathy Seidel, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**RE: In the Matter of Improving Public Safety
Communications in the 800 MHz Band
WT Docket No. 02-55
Ex Parte Presentation**

Dear Ms. Seidel:

On behalf of AIRPEAK Communications, LLC ("AIRPEAK" or "Company"), we wish to respond to the April 19, 2005 *ex parte* comments ("Comments") filed by Nextel Communications, Inc. ("Nextel") regarding the Enhanced Specialized Mobile Radio ("ESMR") election filed by AIRPEAK with the Transition Administrator ("TA").¹ The Company did not respond previously, because Nextel had indicated it also might file comments relating to AIRPEAK's April 13th supplemental filing with the TA.² To the best of AIRPEAK's knowledge, Nextel has not filed any further response.

As an initial matter, it is not clear why Nextel's objections to AIRPEAK's ESMR election were filed with the Commission rather than the TA. The FCC has charged the TA with "detailing-by NPSPAC region-which relocation option each non-Nextel ESMR licensees (sic) has chosen."³ The FCC also has determined that the TA "will specify a replacement channel for each channel in the licensee's system that needs to be changed to a new channel."⁴ Of necessity,

¹ Nextel's Comment also addressed the ESMR elections filed either with the TA or with the FCC directly by other parties.

² Comments at n. 29.

³ *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 at ¶ 201 (2004) ("800 MHz Order")

⁴ *Id.* at ¶ 198.

Cathy Seidel, Acting Chief

May 12, 2005

Page 2

this means that the TA must make an initial determination whether some or all of an entity's channels qualify for relocation as an ESMR and to which channels they should be relocated. The FCC directed non-Nextel ESMRs to file their elections with the TA, with a copy to the FCC, since "the elections made by these non-Nextel ESMR operators are relevant data points in the TA's planning of the band reconfiguration schedule."⁵ It is unclear why Nextel has decided to bypass the TA on this matter and take its objections directly to the FCC.

Further, AIRPEAK must protest Nextel's description of the Company's submission of its ESMR election pursuant to a request for confidentiality under Sections 0.457(d) and 0.459 of the FCC rules.⁶ Contrary to Nextel's accusation, this was neither an attempt to deny access to information to which Nextel or others were entitled or to hide pertinent information.⁷ Before requesting confidential treatment of the document, undersigned counsel contacted the FCC's Wireless Telecommunications Bureau ("WTB") to confirm that doing so would be permissible. The Company's counsel was advised that it had the right to request confidential treatment of the information, that the FCC would review the confidentiality request if another party requested to review the filing, and that it would then make a decision as to the sufficiency of the confidentiality showing.

Nextel presumably expected AIRPEAK to file an ESMR election. The Company made no secret of the fact that it had done so. In fact, its ESMR election was submitted to the FCC under a cover letter explaining that it was accompanied by a Confidentiality Request seeking "confidential treatment of the attachments to the TA letter." AIRPEAK specifically did not request that the FCC keep the letter accompanying and describing those attachments or the fact of its submission confidential. That decision was made by the Commission. In any event, AIRPEAK subsequently was asked by the TA if it would file a redacted version of the filing.⁸ The Company did so promptly.

As to the specific objections to AIRPEAK's ESMR election filing, the Company provides the following responses:

- 1) Nextel's fundamental position, and the basis for most of its complaints, is that ESMR status is determined on an EA-by-EA basis and demands a showing that the party meets the ESMR definition in each EA. But neither the 800 MHz Order, the Supplemental

⁵ *Order*, WT Docket No. 02-55, 19 FCC Rcd 22876 (2004).

⁶ 47 C.F.R. §§ 0.457(d) and 0.459.

⁷ Comments at pp. 9-10.

⁸ It also should be noted that AIRPEAK submitted its Supplemental Filing to the TA, not as "another bite at the apple," Comments at p. 10, but at the request of the TA. Nextel may believe it has an infallible understanding of the 800 MHz Order and the *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) ("Supplemental Order") in respect to ESMR elections. The TA is making a committed effort to reach a reasoned understanding of the complex, and sometimes contradictory, FCC statements regarding this subject that is consistent with the FCC's objectives in this proceeding.

Order, nor the definition itself impose any such requirement. There is no geographic component to the definition, nor should there be. As Nextel knows better than most, an ESMR network is an integrated system. It is not designed or defined by EAs, but by market-specific consumer demands. Indeed, cell sites may provide coverage into multiple EAs and the optimal coverage for a market may be from a site outside the EA in which it is located. In AIRPEAK's, as in Nextel's and SouthernLINC's iDEN systems, cell sites at locations throughout the network operate seamlessly through the controlling network switch or switches without FCC-related geographic distinctions.

This approach is fully consistent with the Commission's objective of separating the operations of ESMR, cellular architecture systems from high-site facilities operated by public safety and other incumbents to avoid present and future interference. In doing so, the FCC expressly recognized that ESMR systems were not static entities and would be modified and expanded over time. For example, it specifically noted there was no evidence that the iDEN network operated by SouthernLINC had caused interference to other incumbents. Nonetheless, it acknowledged that SouthernLINC should have the option of relocating *in toto* to the ESMR band, because its system used a cellular architecture and future deployment which "could be a source of interference to public safety and other non-cellular licensees."⁹ It considered that system (and Nextel's) as a whole, not by EA or some other arbitrary geographic parcel, and treated it as an integrated network.¹⁰

The same must be true for AIRPEAK. Once qualified as operating an ESMR network, both the FCC's rules and its policy objectives in this proceeding confirm that the Company is allowed to elect relocation of all its spectrum to the ESMR band that otherwise meet FCC requirements.

- 2) Nextel argues that the information provided in the Company's ESMR election is insufficient to establish AIRPEAK's ESMR retuning rights. Its criticism falls into three general categories:

- A. Nextel complains that the information provided is not sufficiently detailed to allow confirmation of its accuracy, even claiming:

AIRPEAK provides no information on the technical parameters, addresses, coordinates, the ERP, the HAAT, the antenna heights, or 800 MHz channels that are in use at *any* of the sites that allegedly comprise its network, making it impossible to confirm whether AIRPEAK's "network" of sites truly justifies an ESMR designation

⁹ 800 MHz Order at ¶ 161.

¹⁰ An investigation of Nextel's system on an EA-by-EA basis would confirm that Nextel is not currently operating an ESMR system in many parts of the country

for relocation purposes in *any* of the markets in which it seeks such treatment.¹¹

First, it is evident that Nextel's statement is inaccurate, as even Nextel seemingly concedes later in the Comments.¹² AIRPEAK provided an attachment with its map depicting the cell sites it used to satisfy the ESMR definition in which it provided the information required. The attachment listed the cell sites by the building or transmitter site name commonly used to identify the locations within the market. It also specified the antenna height and the HAAT of the cell sites¹³ and certified that each was licensed for more than 20 channels. The ERP is of no significance under the FCC's test, and the Company has no idea what other "technical parameters" Nextel believes should have been provided.

AIRPEAK would be pleased to supply any additional information requested by the TA or the FCC relating to this or any other information provided in the ESMR election filing. It would welcome site visits by their representatives. The Company was unaware that Nextel intended to verify the accuracy of information provided by AIRPEAK's president under penalty of perjury, but it would not object if Nextel wished to visit the sites as well, although some confidentiality protection might be required.¹⁴ In fact, since Nextel and AIRPEAK are co-located at numerous sites in their respective networks, it is surprising that Nextel continues to characterize AIRPEAK's system as "high-site."

- B. Nextel also takes the position that the ESMR definition calls for 20 operational channels at a cell site relied upon to meet the definition. It claims that AIRPEAK has not satisfied that test either.

But the definition does not use the term operational in reference to the number of channels. It says that one of the sites used to define an ESMR must have "twenty or more paired frequencies."¹⁵ The criterion was recommended to the Commission as part of a test intended to capture the characteristics of a cellular

¹¹ Comments at p. 10 (original emphasis).

¹² Comments at p. 15, noting the map and spreadsheet describing Reno, NV sites with overlapping contours.

¹³ Nextel even calls to the FCC's attention to the fact that a single site-based AIRPEAK license, one that was **not** included as an ESMR-defining site, has an HAAT of 753 feet. Comments at pp. 12-13. Surely, not even Nextel believes that all sites in an ESMR network must meet the low-site definition. If that were the case, not a single cellular or PCS system, or the systems operated by Nextel and SouthernLINC, would be considered to have a cellular architecture.

¹⁴ Interestingly, AIRPEAK advised Nextel more than two years ago that the Company had experienced interference with public safety systems and invited Nextel engineers to visit the system or contact AIRPEAK to learn more about the specific problems that had occurred. This was during the period when the cause and scope of 800 MHz CMRS/public safety interference was under active investigation. Despite follow-up from the Company, that matter was not of sufficient interest to prompt even a telephone call from Nextel, much less a site visit.

¹⁵ 47 C.F.R. § 90.7.

architecture system with the potential to cause interference. The fact that a system might have 20 or more analog channels operating at a particular site was not itself significant even if the facility was "low-site." Many traditional analog systems operate much larger low-site or combination low-site/high-site facilities without causing interference. However, unless a licensee had at least 20 licensed 25 kHz bandwidth channels at a site (more probably at multiple sites) it was unlikely to have sufficient capacity to warrant investing in and deploying a cellular architecture network that would allow those channels to be subdivided into a multiple of 20 voice paths and repeated at multiple locations within close proximity of one another.

AIRPEAK operates a digital network, identical in this respect to the iDEN networks operated by Nextel and SouthernLINC. Each of the Company's 25 kHz bandwidth authorizations actually supports 3 or 6 channels of voice communications, depending on whether the transmission is an interconnected or dispatch message. Each cell site in AIRPEAK's network is typically designed to accommodate up to 22 25 kHz channels in an omni configuration. In a 3 sector environment, up to 39 25 kHz channels are configured with up to 13 channels per sector in each of 3 sectors. Of course, as noted above, each of these 25 kHz channels actually carries anywhere from 3 to 6 communications channels (talk paths) depending on the interconnect/dispatch ratio.

This system design is entirely consistent with the cellular architecture networks operated by Nextel and SouthernLINC. Indeed, AIRPEAK has been advised that the SouthernLINC iDEN network uses no more than 17 25 kHz channels at any of its more than 500 cell sites; although, like Nextel and AIRPEAK, SouthernLINC is licensed for a much larger number of channels at each site and deploys its infrastructure based on subscriber usage patterns. It surely would be a surprise to SouthernLINC that, under Nextel's analysis, SouthernLINC's operation would not "have the density or channel use that would be found in a full ESMR system."¹⁶

- 3) Finally, the Comments identify certain site-based stations included in AIRPEAK's ESMR election that do not meet the ESMR relocation tests set out in the 800 MHz Order and the Supplemental Order and describe the Company as ignoring the ESMR criteria.¹⁷ That characterization again is incorrect. The ESMR election itself identified each of those stations and explained that the Company intended to request reconsideration and/or a waiver of the particular rules that precluded them from qualifying for relocation to the ESMR band. Subsequently, AIRPEAK filed both a limited request for reconsideration and a waiver addressing these very stations. Nextel has opposed both filings. It now is

¹⁶ Comments at p. 15.

¹⁷ Comments at p. 13.

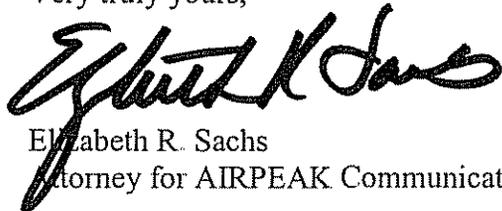
Cathy Seidel, Acting Chief
May 12, 2005
Page 6

up to the FCC, not Nextel, to determine whether reconsideration or waiver relief should be granted.

AIRPEAK has satisfied the FCC's test to qualify as an ESMR system. Having done so, it is entitled to elect relocation of all EA and qualified site-based licenses to the ESMR band and it has done so.

Should the Commission or the TA require any further information or documentation in respect to this matter, please contact the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read "Elizabeth R. Sachs". The signature is fluid and cursive, with a large initial "E" and "S".

Elizabeth R. Sachs
Attorney for AIRPEAK Communications, LLC

cc: David Furth
Michael Wilhelm
Roberto Mussenden
Sam Feder
John Branscome
Paul Margie
Barry Ohlson
Robert B. Kelly,
Counsel for the Transition Administrator
James Goldstein, Nextel Communications